

FCC 04-10-0001

FCC FILE 00-270 (ORIGINAL)

Before the
Federal Communications Commission
Washington, D.C. 20554

Mar 15 11 00 AM '04

In the matter of)
Amendment of Section 73.202(b))
FM Table of Allotments,) MB Docket No. 03-57
FM Broadcast Stations.) RM-10565
(Fort Collins, Westcliffe and)
Wheat Ridge, Colorado))

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 17, 2004**Released: March 19, 2004**

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a *Notice of Proposed Rulemaking*¹ issued at the request of Tsunami Communications, Inc. ("TSI") requesting changes to the FM Table of Allotments in Colorado.² TCI filed comments. Meadowlark Group, Inc. ("MGI"), filed a counterproposal, comments and reply comments. Jacor Broadcasting of Colorado, Inc. ("Jacor") filed reply comments. For the reasons discussed below, we are granting TCI and Jacor's proposal and dismissing MGI's counterproposal.

2. At the request of TCI, licensee of Station KTCL, Fort Collins, Colorado, the *Notice* proposed the substitution of Channel 227C0 for Channel 227C, reallocation of Channel 227C0 from Fort Collins, Colorado, to Wheat Ridge, Colorado, and modification of the license for Station KTCL accordingly. To accommodate the allotment at Wheat Ridge, TCI also requested the substitution of Channel 249A for vacant Channel 227A at Westcliffe, Colorado. The proposed reallocation of Station KTCL was filed pursuant to the provisions of Section 1.420(i) of the Commission's rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.³ In support of the proposal, TCI states that Channel 227C0 may be allotted to Wheat Ridge consistent with the Commission's spacing requirements and would provide a first local service for the community.⁴ TCI provided information establishing community status for Wheat Ridge. TCI also stated that Fort Collins is the central city in the Fort Collins Urbanized Area while Wheat Ridge is located in the Denver Urbanized Area. Thus, Station KTCL is not relocating from a rural to an urban area as the station is already located in an urban area. TCI stated that Station KTCL's

¹ See *Fort Collins, Westcliffe and Wheat Ridge, Colorado*, 18 FCC Rcd 4461 (MB 2003).

² The Petition for Rule Making dated June 11, 2002, was filed by Tsunami Communications, Inc., as licensee of Station KTCL. As reflected in the Commission's records, the licensee of Station KTCL is now Jacor Broadcasting of Colorado, Inc., ("Jacor") pursuant to a *pro forma* merger of Tsunami Communications, Inc., into Jacor following Commission approval. See FCC File No. BALH-20030820AAJ.

³ See *Modification of FM and TV Authorizations to Specify a new Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

⁴ The allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3).] See *Second Report and Order in BC Docket 80-130, Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1982).

current 70 dBu contour already covers 100 percent of the Fort Collins and Boulder Urbanized Areas and more than 50 percent of the Denver Urbanized Area. TCI provided a showing that Wheat Ridge is independent of Denver under the factors set forth in *Faye and Richard Tuck*.⁵

3. MGI filed a counterproposal in this proceeding. MGI proposes the allotment of Channel 248C at Creede, Colorado, as a first local service. To accommodate the allotment at Creede, MGI requests changes at Lake City, Poncha Springs, and Denver, Colorado, and Raton, New Mexico. The proposal requires substitutions for three vacant allotments: substitution of Channel 257A for Channel 247A at Lake City, Colorado, substitution of Channel 277A for Channel 248A at Poncha Springs, Colorado, and substitution of Channel 248C1 for Channel 249C1 at Raton, New Mexico.⁶ The proposed Channel 277A substitution at Poncha Springs is necessary to accommodate the allotment at Creede and is also dependent on the reclassification of Station KRFX, Channel 278C, Denver, Colorado, from Channel 278C to Channel 278C0. MGI acknowledges that the reclassification of a station cannot be requested in a counterproposal. MGI contends, however, that its proposal is acceptable because an *Order to Show Cause* has already been issued to Jacor Broadcasting of Colorado, Inc., licensee of Station KRFX, in another proceeding proposing the reclassification of Station KRFX.⁷ MGI argues that its counterproposal is superior to TCI's proposal as it will provide a first local service at Creede while serving a "white area" with 137 people and will provide service to a "gray area" with 2,285 people.⁸ The allotment at Wheat Ridge will only provide a first local service. MGI states that its proposal satisfies the first, second, and third allotment priorities established by the Commission while TCI's proposal satisfies only priority three. However, MGI contends that both proposals can be granted. MGI believes that Station KTCL can be modified to specify Wheat Ridge as the community of license without changing the current Station KTCL transmitter site because Station KTCL already serves 100 percent of Wheat Ridge with a 70 dBu signal with its present facilities. MGI also states that the proposed KTCL site in Jefferson County for Channel 227C0 at Wheat Ridge is located in the Bear Creek Golf Club rather than on Lookout Mountain. MGI does not believe that permission has been obtained to erect a tower at that location and it appears that the site is entirely surrounded by residences and scenic preservation areas which could render the site unusable.

4. Reply comments were filed by Jacor and MGI. Jacor argues that the counterproposal filed by MGI is procedurally deficient as it is contingent on Station KRFX, Channel 278C, Denver, Colorado, downgrading to Channel 278C0, as directed in an *Order to Show Cause* released by the Commission on March 4, 2003. Jacor states that it is the licensee of Station KRFX, Denver, and has not only responded to the *Order to Show Cause*, but filed a minor modification application with the Commission on April 24, 2003, for Channel 278C at Denver.⁹ Therefore, Jacor argues that MGI's counterproposal is contingent and it is Commission policy not to accept proposals that are contingent or dependent upon final action in another rule making proceeding.¹⁰ In response to MGI's assertions that its proposed site for Channel 227C0 at Wheat Ridge is not available, Jacor provided a declaration stating that the owner of the property, Leo Bradley, is amenable to negotiation for use of the property for a transmitter site. This provides reasonable

⁵ See *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

⁶ N'Joy Broadcasting held a license for Station KGOY, Raton, New Mexico (BLH-20010831AAI). The application for the license for Station KGOY, Channel 249C1, and the Call Sign KGOY were dismissed and deleted on June 10, 2003. Therefore, Channel 249C1 at Raton is considered to be a vacant allotment.

⁷ See *Reclassification of License of Station KRFX, Denver, Colorado*, DA 03-585, released March 4, 2003.

⁸ For purposes of FM allotments, a gray area is a geographical area that is served by only one full-time aural service. On the other hand, a white area is one that is not served by any full-time aural service.

⁹ The application was granted on May 19, 2003, and rescinded on May 29, 2003. The application has been returned to pending status awaiting further review. See BPH-20030424AAO.

¹⁰ See *Saint Joseph, Clayton, Ruston, and Wisner, Louisiana*, 18 FCC Rcd 22 (MB 2003).

assurance of site availability which is sufficient for the rule making proceeding.¹¹ Although MGI argues that Station KTCL could be modified to specify Wheat Ridge as the community of license using its current site at Fort Collins, Jacor disagrees. According to Jacor, MGI is incorrect that adequate 70 dBu service can be provided to all of Wheat Ridge from the current licensed transmitter site. Jacor states that large areas of Wheat Ridge, with over 12,000 residents do not receive 70 dBu service from Station KTCL at its current transmitter site. Thus, relocation of Station KTCL as proposed in the *Notice* is necessary. MGI acknowledges that its proposal does require that Station KRFX, Denver, Colorado, be downgraded to a Class C0 facility. MGI states that the downgrade process has already begun pursuant to a *Show Cause Order* issued in another proceeding. MGI further states that although Jacor has filed an application for full Class C facilities at Fort Collins to defeat reclassification, MGI has filed an Informal Objection against the application, arguing that the application is defective and must be dismissed.

5. Discussion. Based upon the information presented in this proceeding, we believe the public would be served by the substitution of Channel 227C0 for Channel 227C and reallocation of Channel 227C0 from Fort Collins, Colorado, to Wheat Ridge, Colorado, since it will provide Wheat Ridge with a first local service. To accommodate the allotment at Wheat Ridge, we shall also substitute Channel 249A for vacant Channel 227A at Westcliffe, Colorado. Fort Collins will retain local service from Stations KPAW, KCSU, and KIIIX(AM). A staff engineering analysis verifies that the requested reallocations can be made in compliance with the Commission's spacing requirements.¹² Our analysis confirms that the reallocation of Channel 227C0 from Fort Collins to Wheat Ridge at Jacor's selected site will result in a loss of service to 317,120 people with a gain in service of 162,357 people with both the gain and loss areas having five or more services. Fort Collins is the central city in the Fort Collins Urbanized Area while Wheat Ridge is located in the Denver Urbanized Area. Thus, Station KTCL is not relocating from a rural to an urban area as the station is already located in an urban area. Station KTCL's current 70 dBu contour already covers 100% of the Fort Collins and Bolder Urbanized Areas and more than 50% of the Denver Urbanized Area. Therefore, the proposed relocations do not implicate the Commission's policy concerning the potential migration of stations from underserved rural areas to well-served urban areas as the station currently serves urbanized areas.¹³ In any event, Jacor has provided a showing that Wheat Ridge is independent of Denver under the factors set forth in *Faye and Richard Tuck*.¹⁴

6. We are dismissing the counterproposal filed by MGI. A staff engineering analysis indicates that Channel 248C can be allotted to Creede, as proposed by MGI, provided changes are made at Lake City, Poncha Springs, and Denver, Colorado, and Raton, New Mexico. Although the substitutions can be made at Lake City, Poncha Springs and Raton, the necessary Channel 277A substitution at Poncha Springs remains short spaced to Station KRFX, Channel 278C at Denver. As stated above, Jacor Broadcasting of Colorado, Inc., licensee of Station KRFX, Denver, has responded to the *Order to Show Cause* by filing an application for Channel 278 as a full Class C facility. The filing of this application is fatal to the MGI counterproposal.¹⁵ Until the application for Channel 278C at Denver is dismissed, the counterproposal filed by MGI is technically defective.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g), and (r), and 307(b) of the Communications Act of 1934, as amended, and 0.61, 0.204(b) and 0.283 of the Commission's rules,

¹¹ See *Key West, Florida*, 3 FCC Rcd 6423 (MMB 1988).

¹² The coordinates for Channel 227C0 at Wheat Ridge, Colorado, are 39-40-18 and 105-07-32. The coordinates for Channel 249A at Westcliffe, Colorado, are 38-03-21 and 105-30-02.

¹³ See *Elizabeth City, North Carolina and Chesapeake, Virginia*, 9 FCC Rcd 3586 (MMB 1994).

¹⁴ See 3 FCC Rcd 5374 (1988).

¹⁵ See 15 FCC Rcd 21649, 21656 (2000), *1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*.

IT IS ORDERED That effective May 3, 2004, the FM Table of Allotments, Section 73.202(b) of the Commission's rules, IS AMENDED, with respect to the communities listed below, as follows:

Community	Channel No.	
	Present	Proposed
Fort Collins, Colorado	227C, 300C1	300C1
Wheat Ridge, Colorado	-----	227C0
Westcliffe, Colorado	227A	249A

8 IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Jacor Broadcasting of Colorado, Inc. for Station KTCL, Fort Collins, IS MODIFIED to specify operation on Channel 227C0 at Wheat Ridge, Colorado, in lieu of Channel 227C at Fort Collins, Colorado, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee of Station KTCL shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted by Station KTCL in accordance with Section 73.1620 of the Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's rules unless the proposed facilities are categorically excluded from environmental processing.

9. IT IS FURTHER ORDERED, That the counterproposal filed by Meadowlark Group, Inc. IS DISMISSED.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change of community. As a result of this proceeding, Jacor Broadcasting of Colorado, Inc., licensee of Station KTCL, Fort Collins, Colorado, is required to submit rule making fees in addition to the fees required for the applications to effect the changes of community and class of channel for Station KTCL.

11. For further information regarding the proceeding listed above, contact Kathleen Scheuerle, (202)418-2180.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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Media Bureau